No. 98-0134

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1997

MICHAEL LEVINE,

Petitioner,

- against -

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

United States v. Smith, 1998 WL 527066 (9th Cir. Cal.), reported after the filing of the Petition, has given rise to a conflict between the circuits on an issue central to the determination of liability under the insider trading rules.

In *Smith*, the Ninth Circuit held that the government must "demonstrate that the suspected inside trader *actually used* material non-public information in consummating his transaction." 1998 WL 527066, *17 [emphasis added].

Smith thus places the Ninth Circuit in direct conflict with a decision of the Second Circuit in *United States v. Teicher*, 987 F.2d 112 (2d Cir. 1993), which concluded that "knowing possession" alone is sufficient to sustain a finding of insider trading, 987 F.2d at 119-120, even where the objective evidence does not show actual use or reliance by the defendant on such information.

This issue is directly relevant to the instant case. Levine argued strenuously below that he made no actual use of the statement made by Zurawin in the November 9, 1989 telephone call. Levine testified that he had substantively investigated the stock after selling his first purchase eight days earlier, was seriously considering re-investing in DeSoto at the time of Zurawin's telephone call and, finally, that he did not re-invest in DeSoto until *after* completing additional research, particularly a Reuters survey on the stock. *See Petition for a Writ of Certiorari* at 5-7. Thus, Levine presented an issue of fact as to whether he did "actually use" the Zurawin telephone call in his trading decision.

In response, the government contended that it was irrelevant that Levine may have made no actual use of the statement made by Zurawin. The government argued that merely being

"in possession" of Zurawin's statement was sufficient to debar Levine from trading in the company's stock.

The government's argument was consistent with the approach then prevailing under *Teicher*, *supra*. In *Smith*, however, the Ninth Circuit now rejects the entire panoply of reasoning employed by the Second Circuit in *Teicher*, giving rise to a direct conflict between the circuits as to whether a trader must "actually use" the alleged material non-public information, *Smith*, 1998 WL 527066,*17, or whether mere "knowing possession" of the information at the time of trading, *Teicher*, 987 F.2d at 119-120, is a sufficient basis on which to impute liability.

This dichotomy directly implicates this Court's prior jurisprudence. In rejecting the Second Circuit's analysis in *Teicher*, the Ninth Circuit in *Smith* relied on this Court's formulation in *United States v. O'Hagan*, -- U.S. --, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997), that a deceptive act or practice occurs when the trader "*uses* the information to purchase or sell securities." *Smith*, 1998 WL 527066,*15, *quoting O'Hagan*, 117 S.Ct. at 2209 [emphasis added], and this Court's observation in *Dirks v. SEC*, 463 U.S. 646 (1983), that "a purpose of the securities laws was to eliminate '*use* of inside information for personal advantage.' " *Id.*, *quoting Dirks*, 463 U.S. at 662 [emphasis added]. *Smith* also notes the dictum in *Chiarella v. United States*, 445 U.S. 222 (1980), that "[t]he federal courts have found violations...where corporate insiders *used* undisclosed information for their own benefit." *Id.*, *quoting Chiarella*, 445 U.S. at 229 [emphasis added].

If *Smith* is found to represent the true state of the law as to "use" versus "possession", then Levine's appeal (and the underlying motion for summary judgment) may well have been decided differently since there was most certainly presented an issue of fact as to whether Levine made actual

"use" of information from the Zurawin telephone call. Since *Smith* holds that even *insiders* must be shown to have "actually used" the material non-public information, *Smith*, 1998 WL 527066,*16, the question becomes even more compelling in the government's case against Levine, who was neither a fiduciary nor an insider and, being a dealer in photocopy machines, was never even a participant in the target company's industry, the manufacture of paint.

Consequently, the Petition encompasses issues now brought into dispute between *Teicher* and *Smith*. As shown by the Ninth Circuit's analysis, *see Smith*, 1998 WL 527066,*15, *Teicher* and *Smith* represent diametrically opposite inferences taken by the circuits from this Court's leading jurisprudence in the field of insider trading. Thus, the resolution of this issue will not only settle an issue raised by Levine below, but will clarify the law and achieve uniform decisions among the circuits.

CONCLUSION

For these additional reasons, a writ of certiorari should be issued to review the opinion and judgment of the United States Court of Appeals.

Respectfully submitted,

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